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10 *Counsel for Plaintiffs DEBORAH DAMES
11 and TIMOTHY MATHEWS, individually and
12 on behalf of all others similarly situated*

13
14 **UNITED STATES DISTRICT COURT**
15 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
16 **SAN JOSE DIVISION**

17 MAXIMILLIAN KLEIN, et al.,

18 Case No. 20-CV-08570-LHK

19 Plaintiffs,

20 v.
21 **THE *DAMES* PLAINTIFFS' NOTICE OF
22 MOTION AND MOTION FOR
23 APPOINTMENT OF INTERIM LEAD
24 PLAINTIFFS' COUNSEL; MEMORANDUM
25 OF POINTS AND AUTHORITIES IN
26 SUPPORT**

27 FACEBOOK, INC.,

28 Defendant.
29
30 Hearing Date: March 18, 2021
31 Time: 1:30 p.m.
32 Judge: Hon. Lucy H. Koh

**NOTICE OF MOTION AND MOTION FOR
APPOINTMENT OF INTERIM LEAD PLAINTIFFS' COUNSEL**

PLEASE TAKE NOTICE that on or before March 18, 2021, Plaintiffs Dames and Mathews (the “*Dames* Plaintiffs”) hereby respectfully request that this Court appoint Quinn Emanuel Urquhart & Sullivan, LLP (“Quinn”) and Keller Lenkner LLC (“Keller”) (collectively with Quinn, “Quinn and Keller”) as Interim Co-Lead Counsel for the putative “User Class” and Kessler Topaz Meltzer & Check LLP (“Kessler Topaz”) to assist Interim Co-Lead Counsel as the Court sees fit or to any committee appointed by the Court.

This Motion is based upon this Notice, Memorandum of Points and Authorities, the Declaration of Melissa L. Troutner (“Troutner Decl.”) and the exhibits thereto, all matters on which judicial notice may be taken, and on such other evidence and/or argument as the Court may deem appropriate. As explained further in the attached Memorandum of Points and Authorities, Quinn and Keller and Kessler Topaz meet the criteria set forth in Federal Rule of Civil Procedure 23(g) and are highly qualified to represent Plaintiffs and the User Class. As such, Quinn and Keller should be appointed as Interim Co-Lead Counsel for the User Class and Kessler Topaz should be appointed to assist Interim Co-Lead Counsel or to any committee appointed by the Court.

MEMORANDUM OF POINTS AND AUTHORITIES

Pursuant to Federal Rule of Civil Procedure 23(g) and the Court’s Order Granting Motions to Relate; Consolidating Cases; Setting Case Schedule; Denying Stipulation and Motions as Moot (ECF No. 47), the *Dames* Plaintiffs, by and through their attorneys, submit this memorandum in support of the appointment of Quinn Emanuel Urquhart & Sullivan, LLP (“Quinn”) and Keller Lenkner LLC (“Keller”) (collectively with Quinn, “Quinn and Keller”) as Interim Co-Lead Counsel for the putative User Class. The *Dames* Plaintiffs further submit that their counsel, Kessler Topaz Meltzer & Check LLP (“Kessler Topaz”), is well-suited to assist Quinn and Keller in representing the User Class, and should be appointed to assist Interim Co-Lead Counsel as the Court deems appropriate or to any committee appointed by the Court.

I. INTRODUCTION

On December 11, 2020, the *Dames* Plaintiffs filed an action on behalf of themselves and two proposed classes of Facebook users who maintained a Facebook profile at any point from 2007 through December 11, 2020 (the “Class Period”).¹ The *Dames* Complaint alleges that Facebook harmed its users by willfully acquiring and maintaining monopoly power in the relevant market and was unjustly enriched through its misconduct during the Class Period in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, and unjust enrichment laws.

On January 21, 2021, Judge Beth L. Freeman held that *Reveal Chat Holdco LLC v. Facebook*, No. 20-cv-00363 (“*Reveal Chat*”) was not related to *Klein et al. v. Facebook, Inc.*, No. 5:20-cv-08570-LHK (“*Klein*”); *Sherman v. Facebook, Inc.*, No. 3:20-cv-08721-LB (“*Sherman*”); *Dames v. Facebook, Inc.*, No. 3:20-cv-08817-TSH (“*Dames*”); *Kupcho v. Facebook, Inc.*, No. 4:20-cv-08815-JSW (“*Kupcho*”); and *Steinberg v. Facebook, Inc.*, No. 3:20-cv-09130-SK (“*Steinberg*”), finding that the “proposed classes and market definitions differ significantly from” *Reveal Chat*. Order Determining That Cases Are Not Related, *Reveal Chat Holdco LLC v. Facebook, Inc.*, No. 20-cv-00363-BLF, ECF No. 110.

On February 9, 2021, this Court granted the motions to relate *Klein* to *Sherman, Dames, Kupcho*,

¹ *Dames v. Facebook, Inc.*, 5:2020-cv-08817 (N.D. Cal. Dec. 11, 2020), ECF No. 1 (the “*Dames* Complaint”). The *Dames* Plaintiffs assert both an antitrust class and an unjust enrichment class seeking disgorgement of Facebook’s profits resulting from their misconduct.

1 *Steinberg, Layser v. Facebook, Inc.*, No. 21-cv-00337-VC (“*Layser*”), and *Rosenman v. Facebook, Inc.*,
 2 No. 21-cv-00336-VC (“*Rosenman*”), and found that *Affilious, Inc.*, No. 20-cv-09217-EMC (“*Affilious*”) is
 3 also related. ECF No. 47. The Court consolidated the related actions and ordered plaintiffs to file a Motion
 4 for Appointment of Interim Lead Plaintiffs’ Counsel addressing the criteria for appointment set forth in
 5 Federal Rule of Civil Procedure 23(g) by no later than March 5, 2021. *Id.* On February 25, 2021, this Court
 6 also related and consolidated *Garvin v. Facebook, Inc.*, No. 21-cv-00618-KAW (“*Garvin*”) and
 7 *Kovacevich v. Facebook, Inc.*, No. 21-cv-01117-LHK (“*Kovacevich*”). ECF No. 50.²

8 Eight related actions assert claims on behalf of classes of Facebook users who were harmed by
 9 Facebook’s anticompetitive conduct in the “Social Network” and/or “Social Media” markets (the “User
 10 Class”).³ Three related actions assert claims on behalf of advertisers, alleging Facebook’s anticompetitive
 11 conduct harmed advertisers in the “Social Advertising” market (the “Advertiser Class”).⁴ Because these
 12 two groups are distinguishable by their relevant markets and putative classes, the *Dames* Plaintiffs propose
 13 that separate interim lead counsel be appointed for the User Class and the Advertiser Class.

14 Quinn and Keller are highly qualified to serve as Interim Co-Lead Counsel for the User Class. On
 15 December 3, 2020, Quinn and Keller filed the first action on behalf of Facebook users who were injured
 16 by Facebook’s anticompetitive conduct—six days before the Federal Trade Commission (“FTC”) and 40
 17 state Attorneys General (“AGs”) filed similar antitrust actions against Facebook. *See* ECF No. 1. Multiple
 18 related actions followed. Since then, Quinn and Keller have effectively organized and communicated with
 19 plaintiffs’ counsel with regard to coordinating the related actions and efficiently dealing with case
 20 management issues.

21 Quinn and Keller easily meet the requirements of Rule 23(g) and should be appointed as Interim
 22 Co-Lead Counsel; they expended significant time and effort investigating and developing the claims at
 23

24 ² Two actions were subsequently filed that were not addressed in this Court’s orders consolidating cases:
 25 *Cliffy Care Landscaping LLC v. Facebook, Inc.*, et al., No. 21-cv-00360 (D.D.C. Feb. 9, 2021) (“*Cliffy
 Care*”) and *Wasvary v. Facebook, Inc.*, No. 21-cv-01518-SK (N.D. Cal. Mar. 3, 2021) (“*Wasvary*”).

26 ³ The following related actions assert claims on behalf of classes of Facebook users who were harmed by
 27 Facebook’s anticompetitive conduct: *Klein; Sherman; Dames; Kupcho; Steinberg; Rosenman; Garvin; and
 Kovacevich*.

28 ⁴ The following related actions assert claims on behalf of classes of advertisers who were harmed by
 Facebook’s anticompetitive conduct: *Sherman; Affilious; and Layser*.

1 issue, offer vast experience in antitrust class actions and knowledge relevant to this case, and possess and
 2 will commit the resources necessary to effectively prosecute this action on behalf of the User Class. Kessler
 3 Topaz is ready and willing to assist Quinn and Keller and serve in any role representing the User Class that
 4 the Court deems appropriate. Kessler Topaz is one of the nation's largest firms specializing in the
 5 prosecution of complex class action litigation, has substantial antitrust class action experience, and has the
 6 resources and ability to vigorously represent Plaintiffs and the putative User Class in this matter. Kessler
 7 Topaz is committed to working productively and efficiently with Quinn and Keller if either or both are
 8 appointed as Interim Lead Counsel.

9 **II. LEGAL STANDARD**

10 Rule 23(g)(3) provides that “[t]he court may designate interim counsel to act on behalf of a putative
 11 class before determining whether to certify the action as a class action.” Fed. R. Civ. P. 23(g)(3).
 12 Designation of interim class counsel is appropriate here “to protect the interests of the putative class.” Fed.
 13 R. Civ. P. 23, advisory committee’s notes on 2003 amendments. Appointing interim counsel facilitates
 14 “achieving efficiency and economy without jeopardizing fairness to the parties.” MANUAL FOR COMPLEX
 15 LITIGATION § 10.221 (4th ed. 2013) (“MANUAL”). *See also id.*, § 10.22 (explaining interim counsel “assume
 16 a responsibility to the court and an obligation to act fairly, efficiently, and economically in the interests of
 17 all parties and parties’ counsel”).

18 Because the responsibilities of interim class counsel mirror those of class counsel (appointed after
 19 the class has been certified), courts consider the same factors enumerated in Rule 23(g)(1) in selecting
 20 interim class counsel. *See In Re: Yahoo! Inc. Customer Data Security Breach Litigation*, No. 16-md-02752,
 21 slip op. at 1 (N.D. Cal. Feb. 9, 2017) (Koh, J.). Rule 23(g)(1) instructs courts to consider the following
 22 when appointing class counsel: (i) the work counsel has done in identifying or investigating potential
 23 claims in the action; (ii) counsel’s experience in handling class actions, other complex litigation and claims
 24 of the type asserted in the action; (iii) counsel’s knowledge of the applicable law; and (iv) the resources
 25 counsel will commit to representing the class. *See Fed. R. Civ. P. 23(g)(1)(A)*. The court may also consider
 26 any other matter “pertinent to counsel’s ability to fairly and adequately represent the interests of the class.”
 27 Fed. R. Civ. P. 23(g)(1)(B).

1 **III. ARGUMENT**2 **A. Quinn and Keller Have Committed the Resources to Investigate and Develop the**
3 **Claims, Have Worked Collaboratively to Organize the Related Actions, and Are**
4 **Highly Qualified to Represent the User Class**

5 Quinn and Keller easily meet the requirements of Rule 23(g) and should be appointed Interim Co-
 6 Lead Counsel of the User Class.⁵ Quinn and Keller have performed extensive work identifying and
 7 investigating the potential claims in this action as required under Rule 23(g)(1)(A)(i). Quinn and Keller
 8 filed the first antitrust action against Facebook in early December 2020—without the aid of a governmental
 9 investigation. It is clear from both the timing and thoroughness of their complaint that Quinn and Keller
 10 have devoted significant time and resources to investigating and developing claims against Facebook on
 11 behalf of Facebook users. *See, e.g., In re Mun. Derivatives Antitrust Litig.*, 252 F.R.D. 184, 186 (S.D.N.Y.
 12 2008) (appointing firms as interim co-lead class counsel because firms developed antitrust claims at issue
 13 and “filed the first complaints in this case,” and declining to appoint later filing counsel). Other actions
 14 were filed over a month after *Klein*. Quinn and Keller also performed extensive work to coordinate the
 15 subsequently-filed related actions and to efficiently manage negotiations with Facebook and case
 16 management issues.

17 In addition, Quinn and Keller have substantial experience handling complex, antitrust class actions
 18 such as this one, which would serve to benefit the User Class. *See* Rule 23(g)(1)(A)(ii) & (iii). Both firms
 19 have ample experience in litigating antitrust class actions on behalf of plaintiffs, often serving as lead or
 20 co-lead counsel. The firms also have institutional knowledge of the substantive and procedural law
 21 applicable to the claims in this case. And Quinn and Keller have the resources to vigorously represent the
 22 User Class and prosecute this action against a well-funded defendant such as Facebook. *See* Rule

23 ⁵ Separate interim lead counsel should be appointed for the User Class and the Advertiser Class because
 24 these two groups assert different claims on behalf of different classes based on the effect of Facebook’s
 25 anticompetitive conduct in different relevant markets. Courts frequently appoint separate counsel for
 26 different plaintiff classes in antitrust cases and this Court should do the same. *See In re LIBOR-Based Fin.*
Instruments Antitrust Litig., 2011 WL 5007957, at *3 (S.D.N.Y. Oct. 18, 2011) (rejecting proposal to
 27 appoint same interim lead counsel for multiple plaintiff classes since “[a] far more commonsense approach
 28 is to divide plaintiffs into two putative classes and appoint interim lead counsel for each class”); *In re Packaged Seafood Prods. Antitrust Litig.*, No. 15-md-2670, slip op. at 1 (S.D. Cal. Mar. 24, 2016) (“The
 Court finds that this litigation will proceed most efficiently with four groups, or ‘tracks,’ of Plaintiffs” and
 proceeding to appoint different interim class counsel for each group.).

1 23(g)(1)(A)(iv). As one of the largest business litigation firms in the world, Quinn has the resources
 2 necessary to efficiently and effectively prosecute this case and represent Plaintiffs and the User Class.
 3 Keller, a large firm with substantial antitrust expertise, also has the experience and resources to perform
 4 the responsibilities of Co-Lead Interim Counsel for the User Class with Quinn.

5 Finally, Rule 23(g)(1)(B) allows the Court to consider any other matter “pertinent to counsel’s
 6 ability to fairly and adequately represent the interests of the class.” Quinn and Keller have already
 7 demonstrated a desire and drive to lead plaintiffs’ counsel in this action by organizing, coordinating,
 8 communicating and working cooperatively with plaintiffs’ counsel on case management issues. Since
 9 filing the first action, Quinn and Keller have led the effort to organize the related actions. Prior to filing a
 10 motion to relate *Kupcho, Dames, and Steinberg* to *Klein* on January 4, 2021—to facilitate the transfer of
 11 these cases to this Court—Quinn and Keller reached out to Kessler Topaz and other plaintiffs’ counsel on
 12 December 30, 2020. Kessler Topaz agreed to stipulate to Quinn and Keller’s motion to relate.

13 Quinn and Keller have also communicated effectively with defense counsel on behalf of plaintiffs
 14 and the putative classes. For example, Quinn and Keller worked together with Kessler Topaz, as well as
 15 counsel for the *Kupcho* and *Steinberg* plaintiffs, to properly assign and relate the cases before this Court.
 16 After Judge Freeman denied the various motions to relate in *Reveal Chat*, Quinn and Keller immediately
 17 reached out to Kessler Topaz and self-organized plaintiffs’ counsel to discuss the proper assignment of the
 18 other cases and motions for interim lead counsel. Quinn and Keller proposed a framework for the case
 19 management issues, and drafted and circulated a stipulation, including a proposed case management
 20 schedule, which was provided to Facebook regarding the relation of the then-pending User and Advertiser
 21 actions. Kessler Topaz and the majority of plaintiffs’ counsel agreed with the Quinn and Keller proposal.
 22 After the cases were consolidated before this Court, Quinn and Keller continued to take a leadership role
 23 in organizing plaintiffs’ counsel to move forward productively in the consolidated matter. From our
 24 experience to date, we have seen firsthand Quinn and Keller’s leadership and consensus-building efforts
 25 and abilities. The User Class will be well-served by the appointment of Quinn and Keller as Interim Co-
 26 Lead Counsel.

27 **B. Kessler Topaz Is Best Positioned to Assist Interim Co-Lead Counsel**

28 Kessler Topaz is well positioned to assist Interim Co-Lead Counsel and serve the User Class. *See*

1 *In Re: Yahoo! Inc. Customer Data Security Breach Litigation*, No.16-md-02752, slip op. at 2 (N.D. Cal.
 2 Feb. 9, 2017) (appointing a plaintiffs' executive committee). Kessler Topaz has worked cooperatively and
 3 productively with Quinn and Keller throughout the early stages of this litigation and will continue to do so
 4 on behalf of Plaintiffs and the User Class. In addition, Kessler Topaz easily satisfies the Rule 23(g) criteria.
 5 Kessler Topaz is one of the nation's largest firms specializing in the prosecution of complex class action
 6 litigation. Since its founding, the firm has developed a reputation for excellence in litigating complex cases,
 7 including complex antitrust, consumer fraud and unfair and deceptive trade practices class actions, and has
 8 recovered billions of dollars on behalf of the clients and classes it represents. As described in the firm
 9 resume attached as Exhibit 1 to the Troutner Decl., attorneys at Kessler Topaz, including Joseph H.
 10 Meltzer, who leads the firm's Antitrust and Fiduciary Litigation Group, have decades of experience
 11 litigating some of the nation's most complicated antitrust class actions and have successfully recovered
 12 billions of dollars in damages for class members. Mr. Meltzer has been appointed by courts throughout the
 13 country to lead positions in class actions and multidistrict litigations. *See* Exhibit 1, Kessler Topaz Firm
 14 Resume. He has spoken at many conferences on issues related to litigating complex class actions and is a
 15 Hearing Committee Member of the Disciplinary Board of the Supreme Court of Pennsylvania. Partner
 16 Melissa L. Troutner is also assigned to this action. Ms. Troutner has nearly two decades of litigation
 17 experience, including significant expertise in advocating on behalf of plaintiffs and class members in
 18 complex class actions such as this. *See id.*

19 To date, Kessler Topaz has devoted extensive time and effort to researching and investigating the
 20 potential claims of the case and developing the factual support necessary to support those claims.
 21 Additionally, members of the firm interviewed class members and undertook a thorough investigation and
 22 analysis of the law and the potential claims available to the putative classes. Kessler Topaz has also
 23 conferred with Quinn and Keller and Facebook with respect to negotiating stipulations, case management
 24 matters, briefing schedules, and other preliminary matters. And with nearly 100 attorneys, experienced
 25 support staff, and offices on both coasts, including within this District in San Francisco, Kessler Topaz has
 26 the resources required to litigate this case efficiently and effectively as well as a demonstrated history of
 27 pursuing class litigation zealously against well-funded defendants like Facebook. Kessler Topaz knows
 28 from experience how to litigate zealously but efficiently and has repeatedly brought about successful and

1 appropriate resolutions to large complex lawsuits.

2 Moreover, Kessler Topaz has demonstrated a willingness and ability to work cooperatively and
 3 effectively in leadership structures in the past, including with many of the firms that have filed complaints
 4 in the related actions. *See* MANUAL § 10.224 (Courts should assess “the attorneys’ ability to command
 5 the respect of their colleagues and work cooperatively . . . ”). Kessler Topaz works diligently to streamline
 6 litigation and save significant expense for all parties through cost-sharing and reduced duplication of effort.
 7 *See id.* § 10.22 (courts often consider whether the proposed leadership will “act fairly, efficiently, and
 8 economically in the interest of all parties and parties’ counsel”). Kessler Topaz has a proven track record
 9 of working successfully and collaboratively in hundreds of cases with co-counsel, defense counsel, federal
 10 and state law enforcement, and the courts. Indeed, that Kessler Topaz has already been working
 11 cooperatively and effectively with plaintiffs’ counsel, including Quinn and Keller, among others, to
 12 negotiate proposed stipulations and case management matters further demonstrates Kessler Topaz’s
 13 commitment to collaboration, cooperation, and the efficient representation of the User Class.

14 Kessler Topaz stands ready to assist Quinn and Keller with their Interim Co-Lead Counsel
 15 responsibilities on behalf of its clients and the User Class as the Court deems appropriate.

16 **IV. CONCLUSION**

17 For the foregoing reasons, the *Dames* Plaintiffs respectfully request the Court appoint Quinn and
 18 Keller as Interim Co-Lead Counsel for the User Class and appoint Kessler Topaz to assist Interim Co-Lead
 19 Counsel or to any committee appointed by the Court.

21 DATED: March 5, 2021

Respectfully submitted,

22 /s/ Melissa L. Troutner

23 Joseph H. Meltzer (admitted *pro hac vice*)
 24 Terence S. Ziegler (admitted *pro hac vice*)
 25 Melissa L. Troutner (admitted *pro hac vice*)
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Case No. 20-cv-08570-LHK
NOTICE OF MOT. AND MOT. FOR APPOINTMENT OF INTERIM LEAD PLAINTIFFS' COUNSEL

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on March 5, 2021, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses on the Electronic Mail Notice List maintained by the Court.

DATED: March 5, 2021

/s/ Melissa L. Troutner

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